

International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property

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The year is 2776. Like the once great Roman Empire, the United States has become a diminished super-power. All that is left are its monuments which stand as a testament to the country's glorious past.

One dark night, thieves stole the Liberty Bell. The theft was immediately noticed. Yet, no one knew who the perpetrators were nor the whereabouts of the symbol which rang in the era of our once great democratic nation. Over the years, there were various reports of the Liberty Bell's appearance in private collections in England, Germany and Switzerland. However, at no time was the United States able to discover the Liberty Bell's location. In its place, the federal government put in a replica.

Seventy-five years later, the Liberty Bell was reported to have been identified in the private bell collection of a Swiss banker. Long thought to have been lost or destroyed, the United States had given up on its quest to recover it. When reports began surfacing about the Swiss banker's private bell collection, the United States began diplomatic negotiations for the repatriation of the Liberty Bell. The Swiss banker contested the United States' claim by asserting that he was a bona fide purchaser of the Bell. He had acquired the Bell in Switzerland. Moreover, the Swiss banker asserted that the statute of limitations had long since expired under Swiss law. Before the United States could make its claim that the Liberty Bell was vital to the cultural heritage of its citizens and that the Liberty Bell was to become once again the symbolic cornerstone for democracy, the Swiss banker died granting all rights in the Liberty Bell to a museum in Switzerland. The United States tried all legal avenues to recover the Liberty Bell, but it was to no avail. According to the museum and other international authorities, the exhibition of the Liberty Bell in Switzerland would be for the "benefit of all mankind" as it, like Switzerland, existed for peace and democracy. The U.S. was unable to recover one of its most

prized symbols.

I. INTRODUCTION

This short narrative illustrates the reality many modern States experience when symbolic cultural objects, like the Liberty Bell, are lost *forever*. Recovery is often impossible, as public traces of the cultural object disappear when it finds its way into a private collection.¹ Even when the location of the cultural object is known, it will be subject to laws of a foreign State, which often do not afford recovery or restitution on behalf of the State making a claim.² At a time when the art market commands high prices for antiquities and other fine objects of art,³ it is unlikely that the practice of the illicit trade in cultural property will decrease unless strong, preventative measures are taken to stop it on a comprehensive international level.⁴

¹ Often, collectors will have the stolen works stored away in bank vaults or other hiding places. This practice of "freezing" is quite common as it is impossible for the malfasant to pass the stolen object immediately on to the art market. What normally occurs is that the object remains in the vault until such time as it is safe to sell it. Usually the sale will occur in countries like Switzerland where good title is easy to establish. See Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 *Höw. L.J.* 17, 30-33 (1993).

² As we shall see in Part II, civil and common law jurisdictions view the law of transfers of chattel differently when it comes to a bona fide purchaser. The tradition in common law jurisdictions is that title can never pass even if the individual is a bona fide purchaser. However, under civil law, bona fide purchasers are protected, especially after the statute of limitations has tolled. See generally Collin, *supra* note 1, at 21-26; Steven F. Grover, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 *TEX. L. REV.* 1431 (1992).

³ Vincent van Gogh's portrait of Dr. Gachet sold for \$82.5 million while Auguste Renoir's *Moulin de la Galette* sold for \$78.1 million. See Edwin M. Yoder, Jr., *Great Art Abroad and Out of Sight*, *MIAMI HERALD*, May 22, 1990, at A13.

⁴ See Geraldine Norman, *What INTERPOL Wants for Christmas*, *THE INDEPENDENT*, Dec. 22, 1996, at 12. Art theft continues to be the most lucrative and risk-free of all criminal activities. A heist of eleven items from the Isabelle Stewart Gardner Museum in Boston was valued at \$200 million. Private organizations like the Art Loss Register receive between 1000 and 1500 reports of stolen art per month, while only recovering 850 in six years. See *id.*

Beyond this, there is a great economic incentive to deal in "hot" art. Recent estimates value the booming international trade in stolen art at \$4.5 billion to \$6.0 billion *per year*. See Alan Riding, *Art Theft is Booming, Bringing an Effort to Respond*,

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In itself, the idea of what constitutes cultural property is difficult to grasp completely.⁵ Cultural property, contrary to what many think, does not refer explicitly to works of art. Rather, cultural property is a special category of moveable and immovable objects defined by national⁶ and international law.⁷ Cultural property combines the symbolic nature of an

N.Y. TIMES, Nov. 20, 1995, at C11; Gervase Webb, *London 'centre of looted antiquities,'* EVENING STANDARD, Oct. 11, 1995, at 14 (estimating the stolen art trade at £3 billion per year). To further highlight just how lucrative trade in stolen art has become, organized crime has made it one of their special areas of doing business. See, e.g., Dina Kyriakidou, *Art Boom Lures World Crime Networks to Antiquities,* REUTERS WORLD SERVICE, July 31, 1995, at 1.

⁵ For an insightful and provocative discussion of the cultural and property aspects of the cultural property debate, see Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033 (1993).

⁶ See, e.g., U.S. Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (1988). Under the Act archeological materials must be of cultural significance and at least 250 years of age while ethnological materials must be at least 50 years old. See *id.* § 2601.

⁷ See, e.g., United Nations Education, Scientific & Cultural Commission Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 U.N.T.S. 232, 234–236 [hereinafter UNESCO Convention of 1970]. Under the Convention cultural property means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, pre-history, history, literature, art or science and which belongs to one or more of the following categories:

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archeological excavations (including regular and clandestine) or of archeological discoveries; (d) elements of artistic or historical monuments or archeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections;

object with the history and imagination of a nation. It is Native American art. It is the Declaration of Independence. It is the Liberty Bell. It is the Statue of Liberty and every other object of major historical and cultural significance. In the words of one commentator:

[Cultural property] gives each person his intellectual identity, irrespective of whether he is a creator or simply a user. Cultural property in its entirety constitutes a huge heritage which determines our awareness and inspires new bursts of creativity. Any reduction in this heritage, built up over the centuries and constantly added to, means a loss. The protection of cultural property is rightly considered everybody's duty.⁸

Although diversity exists between national and international legislation, the basic theory underlying cultural property is that, being an important tenet of civilization, it is imperative for States to protect cultural heritage from destruction and illicit trafficking in objects of cultural importance at the national and international levels.⁹

Moreover, implicit in the idea of *cultural property* are two very distinct ideas of ownership. On the one hand, as the term suggests, it is attributed a *property* aspect. It is tangible, something that a person can possess, regardless of whether that person is an individual or a legal fiction (e.g. corporation). On the other hand, it is also something that can belong to an entire community defined along ethnic or national lines. The symbolic nature of the object becomes deeply ingrained in the entire life of that community. Imagine Washington, D.C. without the Washington Monument. It is difficult to imagine, yet Europe is littered with obelisks that were taken from Egypt. This is the *cultural* aspect of the term.

(j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and musical instruments.

Id.

Under the UNESCO Convention of 1970, for an object to rise to the level of "cultural property," a State will have to satisfy the definitional requirement of Article 1 as well as show that a nexus exists between the cultural object and the State's cultural and ethnological heritage. See SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVEABLE CULTURAL PROPERTY* 180-183 (1977).

⁸ Georges Koumantos, *Introductory Report, The International Protection of Cultural Property from the Standpoint of Private International Law*, in *INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY: PROCEEDINGS OF THE THIRTEENTH COLLOQUY ON EUROPEAN LAW* (1983) [hereinafter *DELPHI COLLOQUY*].

⁹ See generally WILLIAMS, *supra* note 7, at 15-33.

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Problems arise when claims of ownership to the object arise on *cultural* and *property* grounds. One claim made is that the cultural object belongs to a nation because it is an integral part of that nation's identity and history. The other claim made is that the person(s) in possession of the cultural object are the rightful owners and that the cultural object does not belong to any particular community but to all of mankind. One way of highlighting the competing claims in a cultural property dispute is to ask "Who owns the Past?"¹⁰ Confronted by such adverse claims of ownership, international law has been struggling with this problem for many years in trying to stop the illicit trade in cultural property.

The issue of cultural property, in general, is an immensely charged area of both legal and political discussions.¹¹ Faced with an unprecedented movement toward total globalization at the economic level, nation-states are entrenching themselves within their own geo-political and cultural realities to ebb the destabilizing effect globalization has had in the lives of their citizens.¹² The rise of assertions and clashes surrounding national identity and sovereignty are just two contentious points which highlight this reality. One need only look at the fighting in Chechnya, the breakup of Yugoslavia, as well as the separatist movements in Israel, Northern Ireland, Mexico and the Basque region to see this occurring. These places demonstrate the fervor by which nationalism pushes people toward self-determination and self-representation. Hence, when disputes focus on cultural objects, cultural property is transformed into a hotly contested area because legal claims of

¹⁰ See generally JOHN H. MERRYMAN & ALBERT E. ELSER, 1 LAW ETHICS, AND THE VISUAL ARTS 46 (1987) [hereinafter LEVA].

¹¹ The most recent example is the opening of a tunnel from late antiquity in Jerusalem. The protests surrounding the tunnel's opening by the Israeli government erupted in riots. The Palestinians adamantly protested that the opening of the tunnel would disrupt and cause damage to one of Islam's most sacred mosques due to the waves of tourists the tunnel would attract. Hence, aside from the issue of cultural preservation and the integrity of cultural property, the upheaval that took place in the streets, the press and the diplomatic forum, threatened the entire Israeli-Palestinian peace process. See Alan Rosenberg, *Tunnel Threatens Peace Process*, N.Y. TIMES, Oct. 6, 1996, at A1.

¹² This has become an increasingly discussed issue among political scientists and foreign policy specialists. A recent book by Harvard Professor David Huntington asserts that States are reasserting themselves in the wake of a post-Cold War society. His thesis is based on the idea that States today are trying to establish a "new order" along the lines of culture. See DAVID HUNTINGTON, *THE CLASH OF CIVILIZATIONS: CHAOS IN A NEW WORLD ORDER* (1996).

ownership are infused with politically and emotionally charged interests.

In order to understand the fundamental premise of what a cultural property dispute entails, one must understand the historical background of international cultural property law. The current state of international law confines participants in a cultural property dispute to a rigid legal framework of international conventions that is increasingly becoming harder to implement. These conventions simply fail to fully address the complexities of the interests involved. Problems with the Convention include vague terminology, reliance on national courts' interpretations of international law, as well as jurisdictional difficulties. Each of these problems affect the uniformity in applying existing international law to cultural property disputes. Therefore, any method for dispute resolution must understand and be able to incorporate the dynamics of how culture and property relate to international law. Arbitration is the only method that can incorporate such sophisticated and changing notions in a successful manner.

Part I of this Note will present and briefly discuss the international legal landscape regulating cultural property. Part II discusses the UNIDROIT Convention of 1995 and problems under the Convention in protecting interests in the cultural integrity of cultural objects. Incorporated in that section is a critique of both the UNIDROIT Convention and the legal framework upon which the Convention is based. Part III argues that the best methodological approach to resolve these disputes is arbitration. Finally, Part IV proposes a model international arbitral body to resolve cultural property disputes and the recognition of arbitral awards.

A. Legal Landscape

In addition to various bilateral¹³ and multilateral¹⁴ treaties, there are

¹³ See generally KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 167-172 (1993); P.J. O'KEEFE & LYNDAL V. PROTT, LAW AND THE CULTURAL HERITAGE 668-671 (1989). Bilateral treaties entered into to combat the illegal international trade in cultural property include: Agreement for the Recovery and Return of Stolen Archeological, Historical, and Cultural Properties, Sept. 15, 1981, U.S.-Peru, 33 U.S.T. 1607; Agreement for the Recovery and Return of Stolen Archeological, Historical, and Cultural Properties, July 17, 1970, U.S.-Mexico, 22 U.S.T. 494 (stressing the recovery and return of stolen cultural property items); The Cultural Agreement, June 25, 1960, Spain-Brazil, art. 9, 658 U.N.T.S. 23 (preventing and suppressing the illegal traffic in artistic, historic and documentary objects from

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three major international conventions that seek to protect the origination and integrity of cultural property: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954),¹⁵ the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)¹⁶ and the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (1995).¹⁷ Each Convention resulted from major efforts by the international community to legally enforce the protection of cultural objects. These Conventions, along with countless national laws and treaties, constitute the rocky landscape upon which the litigants have been forced to tread.

either country); The Cultural Convention, July 12, 1960, UK-Spain, art. 10, 414 U.N.T.S. 123, 128 (stipulating that these two countries will cooperate in preventing and suppressing illegal traffic in works of art and other such objects of historical value).

¹⁴ See generally JOTE, *supra* note 13; O'KEEFE & PROTT, *supra* note 13. Among others, the following treaties are examples of multilateral agreements: (1) Far East Asia and Australia: Agreement Establishing a Cultural and Social Centre for the Asian and Pacific Region, *opened for signature* Aug. 1, 1968, 653 U.N.T.S. 427; (2) Africa: Charter of the Organization of African Unity, *opened for signature* May 25, 1963, 479 U.N.T.S. 39; (3) North, Central and South America: Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, 15 I.L.M. 1350; (4) Europe: European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 140 and the European Convention on Offenses Relating to Cultural Property, 1985 E.T.S. No. 119.

¹⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention of 1954].

¹⁶ UNESCO Convention of 1970, *supra* note 7.

¹⁷ International Institute for the Unification of Private Law (UNIDROIT) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, June 24, 1995, 34 I.L.M. 1322 (1995) [hereinafter UNIDROIT Convention of 1995].

1. *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954*¹⁸

For centuries, victorious nations carried away the riches and treasures of the defeated nation.¹⁹ Because there was no international law in place to prevent the looting of conquered nations, legal doctrines were created in the nineteenth century to protect what has come to be known as cultural property. In the aftermath of Nazi looting of the finest public and private collections in Europe and northern Africa, the international community felt pressure to adopt a universal rule protecting cultural property during armed conflict and in times of war.²⁰ Thus, by 1954, the United Nations decided

¹⁸ See Hague Convention of 1954, *supra* note 15.

¹⁹ History is replete with examples of victorious armies plundering the riches of their conquered victims. One of the earliest examples can be found in Hannibal's sacking of Carthage in 33 B.C. See JOTE, *supra* note 13, at 43-45. For the most part, conquering armies hauling away the spoils of war was the norm. Other notable examples from history are the Crusades and the sacking of Constantinople in 1243, the Conquistadors upon discovering the Americas in the 1500s and Napoleon's conquests during the early part of the nineteenth century. See *id.*

This practice continues today. In Cyprus, for example, occupying Turkish forces have allowed the destruction and proliferation of illegally exported cultural objects from the island's northern territory which they occupy. See O'KEEFE & PROTT, *supra* note 13, at 56-60. After Iraq's occupation of Kuwait, Kuwait alleged that Iraq had plundered much of Kuwait's cultural property. See UNESCO Doc. 135 EX/27, item 8.4 (Oct. 11, 1990). Even though Iraq claimed that Kuwaiti reports were greatly exaggerated (see UNESCO Doc. 135 EX/INF.7 (Oct. 23, 1990)), UNESCO was able to determine that offenses relating to cultural property were committed and therefore the Iraqis had to fulfill their obligations under international law. See UNESCO Doc. 136 EX/INF.3, Add. (May 14, 1991). Over 11,000 individuals from 60 countries have filed for damages in excess of \$100,000 as a result of Iraqi malfeasance. See Stephanie Nebehay, *Kuwaiti Seeks \$30 million from Iraq for Stolen Art*, REUTERS N. AM. WIRE, Dec. 12, 1996. Trying to recover from the economic sanctions that have been in place since 1990, Iraqis, ironically, have been illegally exporting their own antiquities at a stunning pace in order to raise capital. See Barbara Crossette, *Iraqis, Hurt by Sanctions, Sell Priceless Antiquities*, N.Y. TIMES, June 23, 1996, at A1.

²⁰ For a general discussion of the historical regulatory background of the Hague Convention of 1954, see The Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 27, 1 Bevans 631, 648 [hereinafter Fourth Hague Convention] (codifying international law and prohibiting the pillaging of the occupied territory); JOTE, *supra* note 13, at 47-56 (1993); Lieber Code in R. HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR; The Brussels Conference of 1874 in TAYLOR, THE LAW OF

that a universal convention was needed to halt this practice. The Hague Convention of 1954 was adopted as the first legal instrument to set a universal precedent for the protection of cultural objects as *cultural property* within modern public international law.²¹ However, lacking from the international framework was a universal law that protected cultural property in times of peace.²²

2. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970: International Protection During Times of Peace*

In 1970, UNESCO²³ assembled to adopt a universal rule for the international protection of cultural property during times of peace.²⁴ The

WAR: A DOCUMENTARY HISTORY xv (L. Friedman ed., 1972) (prohibiting the confiscation and pillaging of art treasures); WILLIAMS, *supra* note 7, at 15-33 (1977); John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 832-836 (1986) [hereinafter Merryman, *Two Ways of Thinking*].

²¹ See JOTE, *supra* note 13, at 47.

²² Just as in times of war, in times of peace, cultural objects, mainly antiquities, were highly prized. Most prized were objects that came from the world's ancient civilizations. By the end of the eighteenth and beginning of the nineteenth centuries, much interest was given to the ancient cultures of Greece and Egypt. See Robert Browning, *The Case for the Return of the Parthenon Marbles*, 36 MUSEUM 38 (1984). The cultural objects that these civilizations produced were particularly appealing to the aesthetic tastes of Western Europeans. Some cultural objects, like the celebrated Elgin Marbles, were obtained by paying off corrupt and disinterested officials. See *id.* at 41. Others were taken in the name of archeology. In both cases, the best cultural objects were taken at the cost of destroying countless other important cultural artifacts. The best examples of such callousness came in Lord Elgin's defacement of the Parthenon's friezes and Henrich Schliemann's excavations of ancient Troy. See *id.* at 48. With the rise of Western Imperialism, such practices filled Europe's museums (notably the Louvre, the London Museum, the Prado and the Berlin Museum) with the finest collections of ancient cultural artifacts in the world. What occurred with respect to cultural objects from ancient Greece and Egypt in the nineteenth century also occurred to the ancient civilizations of Central and South America throughout the twentieth century.

²³ See *supra* note 7.

²⁴ See Merryman, *Two Ways of Thinking*, *supra* note 20, at 832-836. Prior attempts include Resolution XIV, Protection of Moveable Monuments of the Seventh International Conference of American States of 1933, League of Nations International

UNESCO Convention's primary concern is to prohibit and prevent acts that impoverish a nation's heritage through the destructive practices of removing cultural property. Although the Convention deals with measures to prevent the import, export and illicit transfers of cultural objects, it also emphasizes ensuring a State's interest in protecting and preserving its cultural heritage.

In order to ensure the integrity of cultural objects, the UNESCO Convention identifies three goals: (1) to stop the impoverishment of the cultural heritage of a nation through illicit import, export and transfer of ownership of cultural property;²⁵ (2) to agree that trade in cultural objects exported contrary to the law of the nation of origin is illicit;²⁶ and (3) to agree to prevent the importation of such objects and facilitate their return to source nations.²⁷ The international community was becoming increasingly aware that the cultural heritage of many countries (most often, Third World countries) was being destroyed in the pursuit of amassing cultural art whose market value began to surge in the art world.²⁸

The culmination of these and other concerns, including conflict of law issues, prompted UNESCO to seek the assistance of UNIDROIT to look into the problems surrounding the lack of uniformity of international cultural property law. The fruits of that commissioned study eventually led to the ratification of the UNIDROIT Convention of 1995.

Conventions (1933, 1936, 1939), and the Draft International Convention for the Protection of National Collections of Art and History. *See also* JOTE, *supra* note 13, at 57.

²⁵ *See* UNESCO Convention of 1970, *supra* note 7, art. 2, 823 U.N.T.S. at 236.

²⁶ *See id.* at art. 3, 823 U.N.T.S. at 236.

²⁷ *See id.* at arts. 7, 9, 13, 823 U.N.T.S. at 240, 242, 244.

²⁸ *See* Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 280 (1982). *See also* Ralph Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94 (1969); Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466 (1988). It should be noted that there is enormous market pressure on art-rich countries to export their cultural objects and other artifacts. This demand makes the prevention of looting nearly impossible. In such instances a nation's cultural heritage is sacrificed for a better standard of living as cultural objects fetch more money than a normal month's work. *See generally* Dwight B. Heath, *Bootleg Archeology in Costa Rica*, 36 ARCHEOLOGY 217 (1973) (describing how grave-robbing in Costa Rica is seen as a form of mining); John H. Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988).

3. *UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects of 1995*

As significant as the UNESCO Convention of 1970 was in its efforts to create a universal rule dealing with the problems surrounding cultural property, members of UNESCO felt that the Convention did not go far enough, or that at least public international law could not handle all the complexities surrounding these types of disputes.²⁹ The drafting of the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects began when UNESCO expressed interest in seeing its Convention complemented by an international instrument of an essentially private law character.³⁰ Therefore, UNESCO commissioned UNIDROIT to perform a study on the problems surrounding cultural property and its regulation through international public law. Specifically, much concern was given to UNESCO Art. 7(b)(ii), which deals with the recovery and return of cultural property.³¹ After several drafts, the Convention was opened up for signature on June 26, 1995. Although the Convention went into effect on June 30, 1996, the Convention does not "affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument."³² This means that States that are parties to the UNESCO Convention of 1970 or any other bilateral or multilateral agreement will remain unaffected by the UNIDROIT Convention.³³ In other words, with the ratification of the UNIDROIT Convention of 1995, both UNIDROIT's and UNESCO's regulatory schemes will cover the illicit trade and export of cultural property.

The purpose of the UNIDROIT Convention is to seek the harmonization and coordination of the private laws of States and to pave

²⁹ See Marina Schneider, UNIDROIT Research Officer, *The UNIDROIT Convention On Stolen or Illegally Exported Cultural Objects*, paper delivered at London Conference on Art Theft (Nov., 1995) (copy on file with author).

³⁰ The preparatory work on the Convention was conducted between 1988 and 1993, first by a study group, and then by a committee of governmental experts which approved the text of the final draft at its fourth session on June 25, 1995. See *id.*

³¹ See UNESCO Convention of 1970, *supra* note 7, art. 7(b)(ii), 823 U.N.T.S. at 240.

³² UNIDROIT Convention of 1995, *supra* note 17, art. 13(1), 34 I.L.M. at 1336.

³³ See Schneider, *supra* note 29, at 12.

the way for the gradual adoption of uniform rules of private law.³⁴ The UNIDROIT Convention deals with two situations. First, it provides for the restitution of stolen cultural objects, thereby regulating the conflict of interests between the former possessor of such an object and a person acquiring it in good faith.³⁵ Second, it provides for the return of a cultural object unlawfully removed from its State of origin, and opens up the possibility for the recognition of foreign public law.³⁶ Yet, as optimistic as the international community has been, there appear to be problems with the UNIDROIT Convention. The Convention's problems are the result of the tension that exists between national and international interests as well as certain textual weaknesses.

II. UNIDROIT CONVENTION OF 1995: CRITIQUE OF THE INTERNATIONAL REGULATORY SCHEME

Many pragmatic problems result from a weak international regulatory framework. Thus, before one can suggest how arbitration can strengthen UNIDROIT's application by resolving cultural property disputes, a firm understanding of the legal interest must first be achieved. Only then will the Convention's infirmities be properly addressed.

Many view the UNIDROIT Convention as a saving grace for ending the illicit trade in cultural objects.³⁷ Indeed, the UNIDROIT Convention has gone a long way to fill the holes left open by the UNESCO Convention of 1970.³⁸ However, the UNIDROIT Convention is not without its own

³⁴ See *id.* at 1.

³⁵ See UNIDROIT Convention of 1995, *supra* note 17, ch. II, arts. 3 and 4, 34 I.L.M. at 1331.

³⁶ See *id.*, *supra* note 17, ch. III, arts. 5, 6 and 7, 34 I.L.M. at 1332.

³⁷ See, e.g., Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 231 (1993); Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 477 (1994).

³⁸ See Schneider, *supra* note 29, at 1-2. One of the major problems with the UNESCO Convention of 1970 is that the Convention is limited to cultural objects stolen from museums or from religious or secular public monuments and documented as under ownership of that institution. See *id.* In situations where a State chooses not to pursue the private rights of an individual, no protection is available for that individual. Seeing that private owners are not protected under the UNESCO Convention of 1970, the

problematic legal structure.³⁹ The Convention ambitiously attempts to bring together the spheres of public and private international law in the hope of creating a regulatory scheme capable of resolving the many problems surrounding cultural property disputes.⁴⁰ However, this novel approach has three deficiencies. The first of these weaknesses is based on the dichotomous relationship of cultural nationalism and cultural internationalism inherent in cultural property law.⁴¹ Second, there are a host of definitional and interpretative problems inhering in the text.⁴² Third, the Convention's enforcement relies on the judicial interpretation of its provisions by the courts in common and civil law jurisdictions. This third issue is particularly thorny, as the principle of *lex situs* may cause different results depending on the legal system in which the issue is being resolved.

A. Cultural Internationalism Versus Cultural Nationalism

In principle, the Hague Convention of 1954 and the UNESCO Convention of 1970 went a long way in establishing an international legal scheme for the protection of cultural property. Yet, upon closer examination, both Conventions reveal two competing theories upon which cultural property disputes are based—cultural nationalism versus cultural

UNIDROIT Convention sought to extend such protection to those individuals as well. *See id.* Another problem with the UNESCO Convention of 1970 is that its enforcement procedures are seen as "cumbersome." *Id.* Moreover, the vast majority of art-importing countries (e.g. Switzerland, France, Japan, Germany and the Scandinavian countries) are not signatories. Because these countries are major centers for art trade, the fact that they are not signatories provides a giant chasm in affording protection at the international level. For extensive critiques of the UNESCO Convention of 1970, see generally Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L LAW. 235 (1996); Claudia Fox, *supra* note 37; Nina R. Lenzner, *supra* note 37; Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles*, 72 GEO. L.J. 1155 (1984).

³⁹ *See* Schneider, *supra* note 29, at 4.

⁴⁰ Telephone interview with Marina Schneider, UNIDROIT Research Officer, Rome, Italy (Feb. 1, 1997). According to Ms. Schneider, part of the challenge to resolving cultural property disputes will be to see how UNESCO and UNIDROIT will function together as they are the regulatory scheme now in place. *See id.*

⁴¹ *See infra* Part II, Section A.

⁴² *See infra* Part II, Section B.

internationalism. Proponents of cultural nationalism believe that cultural objects "belong within the boundaries of the nation of origin and should stay there. If found abroad, they should be repatriated. Their objective is a system of cultural property law that requires the nation in which a cultural object is found to return it to the source nation."⁴³ On the other hand, proponents of "cultural internationalism" view this as a sentimental appeal on behalf of the source nation and believe that in some cases the demand for the return of cultural objects, "whatever the nationalist justification, serves no substantial international interest."⁴⁴ Thus, when a cultural property dispute arises, the first obstacle encountered is a national interest in recovering the object for cultural reasons versus an international interest in asserting the preeminence of the property aspect over the cultural aspect.⁴⁵

"Cultural internationalism"⁴⁶ proponents view cultural property as a component of common human culture, independent of a nation's property rights in, or national jurisdiction over, a given cultural object.⁴⁷ The rationale for this interpretation is derived from the Preamble of the Hague Convention of 1954, which states in part:

Being convinced that damage to cultural property belonging to any people *whatsoever means damage to the cultural heritage of all mankind*, since each people makes *its contribution to the culture of the world*;

Considering that the preservation of the *cultural heritage is of great importance for all peoples* of the world and that it is important that this heritage should receive international protection⁴⁸

The effect of cultural internationalism with respect to a nation's or an

⁴³ Roger W. Mastilir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1050 n.97 (1993). Repatriation alludes to the term of art in cultural property discussions—patrimony. The legal definition of patrimony is property which has descended in the same family. See BLACK'S LAW DICTIONARY 1127 (6th ed. 1990). Patrimony, in cultural property discussions, connotes the property rights of a nation in a specific cultural object based on historical and ethnological reasons.

⁴⁴ Mastilir, *supra* note 43.

⁴⁵ See *id.*

⁴⁶ Merryman, *Two Ways of Thinking*, *supra* note 20, at 851.

⁴⁷ See *id.*

⁴⁸ Hague Convention of 1954, *supra* note 15, preamble, 249 U.N.T.S. at 240 (emphasis added).

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ethnic community's interest is to render it as a second rate interest. This is evident when cost-benefit analyses⁴⁹ are used to explain why a cultural object should remain outside the source country. In a cultural property dispute, proponents of cultural internationalism assert that the best interest is to protect the integrity of the cultural object; this lies in the preservation of the cultural object itself, not any sentimental interest in keeping the object for symbolic reasons.

"Cultural nationalism,"⁵⁰ on the other hand, views cultural objects as an integral part of a nation's cultural heritage. Proponents of this position elevate the symbolic nature these cultural objects have for their respective communities and place them above any international property interests.⁵¹ They base their position on the language embodied in the UNESCO Convention of 1970. Article 2 of the Convention emphasizes the significance of the cultural object for a particular State and its interest in protecting the cultural object, acknowledging "that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property"⁵² This is further supported in the Preamble, which asserts:

Considering that cultural property constitutes one of the basic elements of civilization and *national culture*, and that its true value can be appreciated

⁴⁹ The benefit of exhibiting a rare cultural object to a broader international public (i.e. to a public outside the object's place of origin) far outweighs the benefit of returning the cultural object to its place of origin because more people have access to it. Moreover, the argument often made is that the cultural object will be better preserved if it is not returned to its place of origin. This is the position of the British government on the Elgin Marbles. For an extended discussion of the Elgin Marbles, see generally Browning, *supra* note 22; John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989); but see John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985). An extreme example of preservation through protective intervention can be found in Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 471 (1994).

⁵⁰ Merryman, *Two Ways of Thinking*, *supra* note 20, at 840.

⁵¹ See, e.g., Ronald Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. REV. 1001, 1002 (1983) (arguing that to rob a nation of its cultural artifacts is to deny one ethical constituent of our humanity); Moustakas, *supra* note 49, at 1188 (arguing that implicit in the idea of cultural property is the notion that cultural objects tied to the historical and ethnological development of a nation are inalienable).

⁵² UNESCO Convention of 1970, *supra* note 7, 823 U.N.T.S. at 240.

only in relation to the fullest possible information regarding its origin, history and traditional setting . . . it is incumbent upon every State to protect property existing within its territory and to prevent its theft, clandestine excavation and export.⁵³

Hence, "cultural nationalism" forms the theoretical basis upon which nations maintain their interest in protecting cultural objects.

Any cultural property dispute must confront permanent removal of the cultural object from its source or its repatriation. The often strong and always competing interests of the country of origin and the current possessor of the cultural object are in direct conflict. Under current international cultural property law, practitioners and courts are still faced with dealing with this difficult problem. The magnitude of this problem of resolving national claims of ownership and private property interests has had a far-reaching effect. This debate affects both private collectors and large institutions. To appreciate the magnitude of the debate surrounding international versus national interest in cultural objects, imagine the consequences many museums would face were they required to return much of the ancient collections.⁵⁴ A tour of the London Museum, the Louvre, the Prado, the Hermitage or the Berlin Museum demonstrates how many objects have been removed from their place of origin and brought to foreign lands.⁵⁵ Although the UNIDROIT Convention does not affect these collections,⁵⁶ it is designed to prevent the expansion of such permanent

⁵³ *Id.* at 232 (emphasis added).

⁵⁴ One reason why the British Government has been so adamant about not returning the Elgin Marbles is because of the precedent it would set for the rest of the world's countries whose cultural property is on permanent display in London.

⁵⁵ Commenting on the American museum experience, the former Director of the Metropolitan Museum in New York was quoted as saying that "almost every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came." Ricardo Elia, *Ricardo Elia Responds*, *ARCHEOLOGY*, May/June 1993, at 1, 17 (quoting THOMAS HOVING, *MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART* (1993)).

⁵⁶ The problem of when and how the Convention is to be applied is one of the most controversial issues of the Convention. See Schneider, *supra* note 29, at 9. The issue of retroactivity was hotly contested. Throughout the various drafts of the Convention, a substantial number of delegations insisted that the Convention would be totally unacceptable in the absence of an express statement that the Convention would be applied only *ex nunc*, that is, prospectively. See UNIDROIT Convention of 1995, *supra* note 17, art. 10, 34 I.L.M. at 1335. Other delegations protested such a provision on the grounds that prospective application would be interpreted as "conferring a seal of

collections in the future.

B. Problems of Definition

Throughout the Convention, the vagueness of many terms and phrases detract from the Convention's potency.⁵⁷ For example, in Article 1, the Convention is said to apply to "claims of an international character" for the

approval or legitimacy on illegal transactions that might have taken place after the entry into force of the Convention for the requesting State as well as for the State where the request is brought." Schneider, *supra* note 29, at 9. The compromise reached between these two camps is represented in Article 10, whereby a State can pursue its rights to the illegal exportation of a cultural object prior to the entry into force of the Convention. A State could not do so under the authority of the Convention. Article 10(1) and (2) state:

(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:

(a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or

(b) the object is located in a Contracting State after the entry into force of the Convention for that State.

(2) The provisions of Chapter III shall apply only in respect of a cultural object that is legally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.

The compromise is achieved in paragraph (3). Article 10(3) states:

This Convention does not in any way legitimize any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.

UNIDROIT Convention of 1995, *supra* note 17, art. 10(1)–(3), 34 I.L.M. at 1335. Therefore, a State whose cultural object was illegally exported would only have those remedies available to it prior to the ratification of the Convention.

⁵⁷ See generally Forbes, *supra* note 38, at 246; Schneider, *supra* note 29, at 10; UNIDROIT Explanatory Report, Dec. 20, 1994 (original in French) (copy on file with author).

restitution or return of cultural objects.⁵⁸ In light of Chapter II (restitution of stolen cultural objects), changes to national laws to adhere to the principles of the UNIDROIT Convention need only be made in cases involving an international element, not to purely domestic transactions. However, under the Convention it has not been decided whether the Convention would apply when a cultural object left the country and was re-imported.⁵⁹ Furthermore, phrases like "fair and reasonable compensation,"⁶⁰ "due diligence"⁶¹ and "reasonable effort"⁶² are also subject to varying interpretations because the Convention does not clearly delineate their meaning. For instance, how is "fair and reasonable compensation" to be determined—according to whose standards?⁶³ Very

⁵⁸ UNIDROIT Convention of 1995, *supra* note 17, ch. I, art. 1, 34 I.L.M. at 1331.

⁵⁹ See Schneider, *supra* note 29, at 7.

⁶⁰ UNIDROIT Convention of 1995, *supra* note 17, ch. II, art. 4(1), 34 I.L.M. at 1332. Article 4 does not give any precise indication, therefore, the amount is to be fixed by the court in light of the circumstances in each case. See Schneider, *supra* note 29, at 7.

⁶¹ UNIDROIT Convention of 1995, *supra* note 17, ch. II, art. 4(1), 34 I.L.M. at 1332. In order to be eligible for compensation under the Convention, the possessor of the cultural object must prove good faith in acquiring the cultural object. Consulting any international art register like the International Foundation for Art Research (IFAR), the Art Loss Register (ALR), or the Register of Stolen Art (ROSA) will normally suffice. See Schneider, *supra* note 29, at 9. However, the circumstances under which the cultural object was purchased will also be considered. For example, factors to be considered are: whether the individual was an art dealer or amateur collector (knowledge); the place where the transaction was conducted (in an antique shop, an open market on the street); the purchase price and other relevant factors. See *id.*

⁶² UNIDROIT Convention of 1995, *supra* note 17, ch. II, art. 4(2), 34 I.L.M. at 1332. Article 4(2) states:

Without prejudice to the right of the possessor to compensation . . . reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought. Nothing, however, in the Convention stipulates by whom these efforts must be made and or who has the legal obligation to exert such efforts.

Schneider, *supra* note 29, at 8.

⁶³ This question deals, in part, with the good faith standards required in Article 9. The only way that possessors of a cultural object that becomes the subject of a dispute is if that person can show good faith is by proving that they "neither knew nor ought

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different results arise if the standard used is the art market, driven by exceptionally high prices, as compared to a nation's standard of living, especially if that standard of living is well below Western standards.⁶⁴ Nevertheless, the issue of *right to payment*,⁶⁵ as it appears in Article 4, paragraph 1, appears to be an absolute provision and it would seem that a State would have to buy back the cultural object. More troubling is that the Convention allows a Contracting Party, under its own national laws, to decide that "fair and reasonable compensation" need not be given at all.⁶⁶ Hence, despite explicit language granting the possessor of a cultural object a right to remuneration, it will always be up to the State litigating the issue to decide what constitutes "fair and reasonable compensation."

C. Lex Situs and the Problems of Common Law Versus Civil Law

It is a well-established rule of private international law that the validity of a transfer of personal property and the ramifications of such a transfer on the rights of a person claiming title will be governed by the law where

reasonably have known that the object was stolen and can prove that [they] exercised due diligence when acquiring that object." Schneider, *supra* note 29, at 8.

⁶⁴ Concerns such as these were allayed to the extent that the:

requirement of compensation would comprise the chances of the dispossessed person to recover an object for lack of financial resources . . . authors of the Convention noted that the concept of fair and reasonable compensation laid down a very strict limit on compensation and allowed regard to be had to the restricted financial resources of some claimants.

Id. at 8.

⁶⁵ The issue of right to payment as it is referred to here did not go without much debate during the final drafting of the Convention. However, the idea of affirming such a right to payment in an international instrument was not uncontested:

Some delegations indeed would have preferred the adoption of a solution which would not have provided for the payment of compensation to a possessor required to return an object, either because their law made no provision for such compensation, or on economic grounds, since dispossessed owners could not always have the financial resources necessary to compensate the good faith purchaser.

Id. at 7. This issue of good faith purchaser, also a contested idea within the Convention, is discussed *infra*.

⁶⁶ This can be done under the authority of the Convention. See UNIDROIT Convention of 1995, *supra* note 17, art. 9(1), 34 I.L.M. at 1339.

the property is located. This principle has come to be known as the *lex situs* rule of property.⁶⁷ This legal principle is especially important for cultural property discussions under the UNIDROIT Convention of 1995. Although the Contracting Parties to the Convention have reached agreement as to the purpose and general application of the Convention in preventing illegal transfers of cultural property, they have not been, pragmatically speaking, successful in resolving the legal ramifications of the principle of *lex situs* which informs discussions concerning cultural property disputes. Because of the Convention's ambitious attempt to harmonize private law and public international law in relation to cultural property, the Convention's future lies in the hands of each Contracting Party's national courts.

Although the UNIDROIT Convention of 1995 provides the legal framework for the restitution⁶⁸ or return⁶⁹ of cultural property, the Convention recognizes that its terms and provisions will have to be determined by the "judicial interpretation"⁷⁰ of each Contracting Party's national courts. This creates a problem because the law of the *situs* will often determine the meaning of the terms and provisions. The Convention's purpose is to harmonize private laws relating to international cultural property disputes. Yet, the uniform application of the Convention is jeopardized as common law and civil law jurisdictions will be interpreting the same provisions in a much different manner.⁷¹

For example, under the Convention, a problem arises from the laws of Contracting States and the question of bona fide purchasers.⁷² As discussed in Part II. B. *supra*, the Convention calls for the compensation of a good faith⁷³ purchaser who has exhibited due diligence⁷⁴ in assessing the title of

⁶⁷ Modern law Latin for "the law of the place where the property is situated." BLACK'S LAW DICTIONARY 913 (6th ed. 1990). This means that the law of a State where the property is located will be used in order to resolve any litigation.

⁶⁸ See UNIDROIT Convention of 1995, *supra* note 17, ch. II, art. 4, 34 I.L.M. at 1332.

⁶⁹ See *id.*, *supra* note 17, ch. III, art. 6, 34 I.L.M. at 1333.

⁷⁰ See Schneider, *supra* note 29, at 8.

⁷¹ For a discussion of common versus civil law in the area of art and cultural property see generally INTERNATIONAL SALES OF WORKS OF ART (Pierre Lalive ed., 1988); O'KEEFE & PROTT, *supra* note 13; Collin, *supra* note 1; Grover, *supra* note 2; Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership is no Pretty Picture*, 43 DUKE L.J. 337 (1993).

⁷² See UNIDROIT Convention of 1995, *supra* note 17, chs. II and III, arts. 4 and 6, 34 I.L.M. at 1332, 1333.

⁷³ See *supra* note 60 and accompanying text.

the cultural object.⁷⁵ Some civil law jurisdictions, like Italy, absolutely protect bona fide purchasers.⁷⁶ Other jurisdictions like France, Germany and Switzerland allow bona fide purchasers to acquire good title, even if the goods are stolen, when the statute of limitations has run.⁷⁷ Conversely, common law jurisdictions, like England and the United States, generally do not permit a bona fide purchaser of a stolen artwork or antiquity to acquire good title.⁷⁸ Thus, when a cultural property dispute arises, different countries will reach different results.

During the drafting of the Convention, many delegates commented that this presumption in favor of bona fides may have “facilitated the passing of illegally acquired cultural objects into licit trade.”⁷⁹ In the case of the illicit trade of cultural objects, many countries that had traditionally protected bona fide purchasers were prepared to change their laws.⁸⁰ However, other States felt that changing their laws in this manner would create “constitutional problems . . . that would be, both politically and philosophically, very difficult to change unless accompanied by the payment of compensation.”⁸¹ In the end, the drafters decided to permit each nation to amend its laws to provide fair and reasonable compensation

⁷⁴ See *supra* note 61 and accompanying text.

⁷⁵ See *supra* note 62 and accompanying text.

⁷⁶ See Riccardo Luzzatto, *Trade in Art and Conflict of Laws: The Position in Italy*, in *INTERNATIONAL SALES OF WORKS OF ART* (Pierre Lalive ed., 1988).

⁷⁷ See Grover, *supra* note 2, at 1449. Regarding the statute of limitations for France, Germany and Switzerland, the period begins the moment the goods are stolen, not when the original owner discovered or should have discovered the theft. See *id.* France’s limitations period is three years. See CODE CIVIL [C. Civ.] art. 2279 (Fr.). Germany’s limitations period runs for ten years. See *Bürgerliches Gesetzbuch* (Civil Code) § 937 [BGB] (Ger.). See Switzerland *Schweizerisches Zivilgesetzbuch* [ZBG] tit. 24, art. 934 (Switz.).

⁷⁸ Generally, both in England and the United States, the original owner retains ownership of the stolen good because the bona fide purchaser will have “void” title. Only in situations where the bona fide purchaser has bought the goods under the best of circumstances free of any modicum of suspicion (England) or the statute of limitations has run (United States) will the *bona fide purchaser* be able to assert better title in the goods. Moreover, if the *bona fide purchaser* obtained the goods under “voidable” title, that is she bought the goods from a seller who acquired them from the original owner by deception, undue influence or misrepresentation, title will pass to the bona fide purchaser.

⁷⁹ Schneider, *supra* note 29, at 8.

⁸⁰ See *id.* at 7.

⁸¹ *Id.*

to bona fide purchasers. To this end, one obvious result is that, in Country X, a bona fide purchaser would be entitled to receive fair and reasonable compensation, while in Country Y, no such right would exist. Relying on Article 9, paragraph 1 of the Convention, countries can avoid granting bona fide purchasers "fair and reasonable compensation"⁸² "insofar as their present law is more favorable to the restitution of stolen cultural objects than are the provisions set out in Art. 4 of the Convention."⁸³ One commentator has suggested that such liberal bona fide purchaser laws reveal why a country like Switzerland has become the "global capital of art smuggling and laundering."⁸⁴ Another commentator has argued that the law of the nation of origin should replace the *lex situs* rule in cultural property disputes, because the country where the theft occurred will normally be the nation in which the property originated.⁸⁵ As the Convention now stands, its application will depend on the jurisdiction in which a party is litigating the dispute, thereby obstructing the uniform application of the Convention and permitting the circumvention of the Convention's goals.⁸⁶

These and other crucial issues, standards and terms will have to be clarified by judicial interpretation in the national courts of the Contracting Parties. The magnitude of this task cannot be over-emphasized. It will be

⁸² UNIDROIT Convention of 1995, *supra* note 17, ch. II, art. 4(1), 34 I.L.M. at 1332.

⁸³ See Schneider, *supra* note 29, at 7.

⁸⁴ Melik Kaylan, *Who Stole the Lydian Hoard?*, CONNOISSEUR, July 1987, at 69. Other commentators have echoed this position: O'KEEFE & PROTT, *supra* note 13, at 408 (suggesting that "Switzerland has the reputation as a suitable transit State for 'laundering' cultural goods"); Judd Tully, *Hot Art, Cold Cash*, J. ART, Nov. 1990, at 4 (quoting Harold J. Smith, an art theft investigator for Lloyd's of London, asserting that Swiss laws "make it extremely difficult for the original owner to recover" the stolen work). Thus, countries like Switzerland, which have liberal bona fide purchaser laws, become centers for art laundering. See generally Grover, *supra* note 2, at 1441-1445; Lee Ann Houseman, *Current Practices and Problems in Combating Illegality in the Art Market*, 12 SETON HALL L. REV. 506 (1982). The Federal Bureau of Cultural Heritage in Switzerland is fully aware of Switzerland's reputation as the "center of stolen art." See JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 215 (2d ed. 1996).

⁸⁵ See Georges Koumantos, in DELPHI COLLOQUY, *supra* note 8, at 114-116.

⁸⁶ The issue of the bona fide purchaser has been a contentious issue from the beginning. This issue originally arose under Article 7(b)(ii) of the UNESCO Convention of 1970. Confronted with the differences between common law and civil law jurisdictions concerning the bona fide purchaser, UNIDROIT has commented on the difficulty of reconciling the law on this topic. See UNIDROIT Explanatory Report, *supra* note 57.

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no small task to bring into line common law and civil jurisdiction on cultural property issues under the Convention. Allowing each Contracting Party's court system to interpret the Convention's provisions on a case-by-case basis will only detract from the Convention's potency. Any hope for uniformity, given the fact that civil and common law jurisdictions will be interpreting the same provisions, but within differing systems of law, will confine the UNIDROIT Convention of 1995 to the same fate as the UNESCO Convention of 1970.

III. ARBITRATION AS THE PROPER FORUM FOR RESOLVING CULTURAL PROPERTY DISPUTES

Advocates of arbitration have long recognized the benefits of this extra-judicial process resolving legal disputes. Not only is arbitration the ideal manner to ultimately resolve disputes, it affords participants the opportunity to implement other forms of alternative dispute resolution as well. For example, contesting parties have the opportunity to first mediate their dispute, fostering a conciliatory environment before it goes to arbitration. Because the law of cultural property in all of its manifestations, both internationally and nationally, has become an increasingly difficult and contentious body of law to apply, the uniform use of arbitration in cultural property disputes affords many advantages over litigation. Therefore, only through an international arbitration tribunal will contesting parties to a cultural property dispute be able to achieve the best and most equitable results.

A. General Advantages of Arbitration in the Cultural Property Realm

In comparison to litigation, arbitration is more fair and convenient for the disputing parties in many respects. To begin with, arbitration provides speed and economy seriously lacking in judicial proceedings which are often long and cumbersome. Parties also have more input and control over issues vital to the successful resolution of these disputes. Contestants may select arbitrators with the requisite expertise in the subject matter of the dispute. This would be very helpful in the cultural property context, as judges are often unfamiliar with the complexities of the various treaties, as well as the cultural significance of the objects. Another unique aspect of arbitration is that contesting parties, who in most cases will be from different countries, may agree upon the language in which the arbitration

process is to be conducted. They may also select a neutral location where their dispute will be arbitrated so that neither party has an unfair advantage.

Arbitration is a superior method of resolving cultural property disputes because conceptions of the *cultural* aspect of cultural property are constantly changing. This is evident as even the general definition of cultural property has evolved numerous times within international law.⁸⁷

⁸⁷ Even under the UNIDROIT Convention of 1995, a compromise had to be reached on what "cultural object" signified before the Convention could be adopted. The result was the incorporation of a general definition along with an exhaustive provision attached at the end of the Convention. The definition of "cultural property," which was appended, was derived directly from the Convention's predecessor, the UNESCO Convention of 1970. See Forbes, *supra* note 38, at 244; Schneider, *supra* note 29, at 5. For further discussion of the debate surrounding the negotiations between the delegations, see Schneider, *supra* note 29; see also the UNIDROIT Explanatory Report, *supra* note 57. For the purposes of this Note the relevant general definitions of cultural property are:

(1) Declaration of Brussels Conference, 1874, Article 8:

the property of . . . institutions dedicated to religion, charity, and education, to the arts and to the sciences, even where they belong to the State shall be treated as private property. All seizures of, destruction or willful damage done to institutions of this character, historic monuments, works of art or of the sciences, should be prosecuted by the competent authorities.

Merryman, *Two Ways of Thinking*, *supra* note 20, at 834;

(2) Fourth Hague Convention, 1907, Article 27: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments . . . provided that they are not being used at the time for military purposes." Fourth Hague Convention, *supra* note 20, art. 27, 1 Bevans 631, 648;

(3) Washington Treaty ("Roerich Pact"), 1935, Article I:

The historic monuments, museums, scientific, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents. The same respect and protection shall be due to the personnel of the institutions mentioned above. The same respect and protection shall be accorded to the historic monuments, museums, scientific, educational and cultural institutions in time of peace as well as in war.

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1955, art. 1, 167 U.N.T.S. 289, 290;

(4) Hague Convention of 1954, Article 1: "movable or immovable property of great importance to the cultural heritage of every people." Hague Convention of 1954, *supra* note 15, art. 1(a), 249 U.N.T.S. 240, 244;

(5) UNESCO Recommendation on the Means of Prohibiting and Protecting the Illicit Export, Import and Transfer of Cultural Property, Paris, Nov. 19, 1964: Article I: “(1) movable and immovable property of great importance to the cultural heritage of a country”;

(6) UNESCO Convention of 1970, Article 1: “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science, and which belongs to the following categories” UNESCO Convention of 1970, *supra* note 7, art. 1, 21 I.L.M. 1261, 1272;

(7) UNESCO Convention 1970, Article 4:

For the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned within the territory of that State by foreign nationals or stateless persons resident within such territory;

(b) cultural property found within the national territory;

(c) cultural property acquired by archeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;

(d) cultural property which has been the subject of a freely agreed exchange;

(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

UNESCO Convention of 1970, *supra* note 7, art. 4, 21 I.L.M. 1261, 1272;

(8) UNESCO *Recommendations on International Exchange of Cultural Property*, 1976, Article I(1) (visited Oct. 9, 1997) <<http://www.icomos.org/unesco/exchange76.html>>: “items which are the expression and testimony of human creation and of the evolution of nature which, in the opinion of the competent bodies in individual States, are, or many be, of historical, artistic, scientific or technical value and interest, including items in the following categories”;

(9) UNESCO *Recommendation for the Protection of Movable Cultural Property*, 1978, Article I(1): (visited Oct. 9, 1997) <<http://www.icomos.org/unesco/moveable78.html>>: “all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archeological, historical, artistic, scientific or technical value and interest, including items in the following categories”

Beyond this, law has always been slow to react to changing forces in our society. In a new world order, new nations are emerging as sovereign entities and older nations are repositioning themselves and redefining their national identities.⁸⁸ These and other shifts would require frequent, difficult modifications and ratifications to the various treaties and national laws affected, a daunting and nearly impossible task. Moreover, it is extremely difficult for international law to establish rules that foresee the changes in local and national interpretations of what constitutes cultural property.⁸⁹ Issues relating to sovereignty and national identity symbolized by cultural property could be better dealt with in an arbitration proceeding than in a judicial context.

B. The Need for an International Arbitration Tribunal

Undoubtedly, arbitration is a superior forum to resolve the legal questions raised in a cultural property dispute under the current international framework. However, in order for cultural property disputes to be resolved efficiently under the best possible conditions, it is essential that these disputes be submitted to a single arbitral body. By granting authority to more than one arbitral body, the chances of creating a multiplicity of diverging interpretations increase. This is the current problem under international law as disputes are litigated under the various laws and in the various judicial tribunals of each Contracting State. To ensure that cultural property disputes submitted for arbitration are resolved in the most equitable manner, it is imperative that authority be given only to one arbitral body.

A single arbitration body would be better able to resolve the legal issues raised in the realm of cultural property. Differences between national

⁸⁸ With the collapse of the Soviet Union, the various Russian Republics have rushed to assert their own political independence. The same is occurring in the former Yugoslavia. The African Continent is on the brink of war again. Hostilities and armed clashes are reaching an all time high in Algeria. Zaire is on the verge of caving in on itself and bringing war and destruction to the surrounding nations. Not even North America is immune from these feelings. Although there has not been any violence associated with the movement, we should not forget that the referendum in Canada failed by the narrowest of margins. Had it passed, Canada would have been split in two—Quebec and Canada.

⁸⁹ Some political scientists have asserted that as a society we are constantly re-inventing ourselves and our communities, at the local, national and international level. See, e.g., BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1981).

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laws and definitional problems inherent in the text of the UNIDROIT Convention of 1995 could be uniformly addressed and resolved. Conflicts of law, already a thorny issue, are exacerbated under the current system because disputes over ownership are seldom confined to the laws of the two opposing parties. The cultural object often passes through several different countries before it finds a place of rest.⁹⁰ The Convention currently relies on the application of foreign laws in domestic (national) courts when requests for return and restitution are made. This is problematic because of political concerns as well as the need to learn foreign laws and apply them in a much different legal culture. Arbitration is a better way of resolving disputes because courts can avoid applying unfamiliar foreign law within their own jurisdiction. Therefore, an added advantage of arbitrating cultural property disputes is that courts will be released from that unwanted task.

There are also practical reasons why arbitration should be utilized for cultural property disputes. First, parties to a dispute would not be bound by strict rules of procedure, evidence and remedies, which often artificially limit relevant information available and preclude a fair result. An arbitration body can circumvent cumbersome procedures and provide equitable remedies that may not be available depending on the national jurisdiction of the judicial proceedings. Second, an arbitral body specializing in the resolution of cultural property disputes can better understand the claims raised by art-importing States and art-exporting States whose interests clash.⁹¹ By providing for arbitration in the case of cultural property disputes, the arbitral body will develop an extensive familiarity with the law of cultural property and can consider the long-range ramifications of its decisions. Third, an arbitral body of this type might be able to consider acts of theft or illegal exportation that occurred prior to the entry into force of the Convention, thereby providing equitable results not available under the Convention as it does not apply retrospectively.⁹² Fourth, establishing an arbitral body under the

⁹⁰ Were Contracting States to adopt strict laws on the illegal exportation and importation of cultural property requiring immediate repatriation of the cultural object when a requesting State demands its return, the conflict of law issue would be a moot point.

⁹¹ This clash of interests occurs on the cultural and economic level. See, e.g., Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1995); Collin, *supra* note 1; Sarah S. Conley, *International Art Theft*, 13 WIS. INT'L L.J. 493 (1995).

⁹² See *supra* note 57 and accompanying text.

Convention would resolve any jurisdictional questions as Contracting Parties to the Convention will be compelled to agree to its authority to arbitrate these issues. Establishing the jurisdictional authority of the arbitral body will also facilitate settlement by getting parties to the table to resolve the dispute before it is submitted for arbitration. Fifth, an international body will be autonomous and function more independently from the influences of national and international politics. In this manner, the arbitral body would constitute an objective conciliator of cultural property disputes, whose decisions are granted more respect by participants. Most importantly, an arbitral body designed solely to resolve cultural property disputes will apply its expertise in an area often marred by diverging results that arise under the various national jurisdictions, because the Convention relies on the judicial interpretation of each Contracting State. Taking into account the numerous definition problems in the UNIDROIT Convention, this arbitral body can, over time, provide a uniform interpretation of the Convention. Finally, because it is important to have a uniform interpretation of the Convention, the arbitral body must be required to submit the reasons for its decisions in writing. Creating a written record will eventually lead to early and increased settlements as parties to a cultural property dispute will have prior knowledge of past arbitral decisions. This consistency and reliability may even decrease the illegal trade of cultural property, as dealers will be denied the current friendly jurisdictions of some nations.

C. The Inadequacies of an International Judicial Tribunal

An international arbitration tribunal is needed because the current legal framework can prove to be too unyielding if courts are relied upon. Some commentators have suggested that the International Court of Justice (ICJ) would be the proper forum for resolving competing national claims of ownership.⁹³ Although the ICJ sits as the supreme adjudicator for disputes between States, its jurisdiction is not compulsory. On the contrary, it is quite easy for a State to opt out of its jurisdiction.⁹⁴ Therefore, with no

⁹³ See, e.g., Prunty, *supra* note 38.

⁹⁴ See *Military and Paramilitary Activities in and against Nicaragua*, 1984 I.C.J. 392 (Nov. 26). The United States contested the jurisdiction of the ICJ, stipulating that it was not a signatory to the treaty and that customary law did not, in effect, make the United States a party. However, the ICJ disagreed and, having found that the United States had not made the proper objection to the Court's jurisdiction within the six month

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compulsory clause and the ability of States to make reservations as to the ICJ's jurisdiction, it does not seem likely that the ICJ could provide a consistent forum for resolving cultural property issues.

Moreover, even if jurisdictional concerns can be resolved, arbitration is a much more effective means of dealing with the complex nature of claims of ownership. Traditional court proceedings involve two parties, or two competing interests, in an adversarial setting. However, in cultural property disputes there are often more than two parties laying claim to cultural objects.⁹⁵ This causes a severe strain on a judicial tribunal which is unable to accommodate the multiple interests. A good example of the need for an international body capable of resolving such disputes is the successful experience demonstrated by the United Nations Convention on the Law of the Sea.⁹⁶ Article 149 of that Convention presents the multi-party problem and demonstrates the benefits of submitting a dispute to a governing body in order to resolve contesting cultural property claims.⁹⁷ Article 149 provides:

All objects of an archeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the *State or country of origin*, or the *State of cultural origin*, or the *State of historical and archeological origin*.⁹⁸

period, found in favor of Nicaragua.

⁹⁵ The debate surrounding "Priam's Treasure" involves three different States—Germany, Russia and Turkey. Considered one of the greatest finds of gold ever, the artifacts were taken out of Turkey (then the Ottoman Empire) and taken back to Germany. During the closing stages of World War II, the Soviets took the Treasure back to Stalingrad where it was hidden away until 1990. Today, all three countries are laying claim as the rightful owners of Priam's Treasure. See S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed From Occupied Germany*, 18 HOUS. J. INT'L L. 59 (1995).

⁹⁶ United Nations Convention on the Law of the Sea, Dec. 20, 1982, 21 I.L.M. 1261 [hereinafter UNCLOS III].

⁹⁷ See, e.g., ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA* 295–326 (1995). Currently there is no international body to deal with the protection and preservation of deep seabed cultural property. According to Strati and others, such an organization is needed in order for art. 149 to be properly implemented. See *id.* at 301.

⁹⁸ See UNCLOS III, *supra* note 96, art. 149, 21 I.L.M. at 1295 (emphasis added).

Within this one article, property right claims are given to three potentially different parties. All of these contentious issues raised under Article 149 also arise in cultural property disputes under the UNIDROIT Convention, including cultural internationalism, cultural nationalism, rightful ownership, possession and multiple parties. Therefore, if a more uniform result is desired in resolving disputes concerning cultural property, an international arbitral body created specifically for international cultural property disputes should be created in the likeness of the arbitral body used successfully by UNCLOS III.

IV. CREATING AN INTERNATIONAL ARBITRAL BODY FOR THE RESOLUTION OF CULTURAL PROPERTY DISPUTES

Creating an international arbitral body under the UNIDROIT Convention of 1995 would be an ideal mechanism for resolving difficult cultural property issues, while making the UNIDROIT Convention an even more effective document. The newly created arbitral body would provide a uniform interpretation and application of the Convention to an otherwise troublesome and highly debated body of law.

Although the UNIDROIT Convention allows for arbitration under Article 8,⁹⁹ the Convention does not specify an arbitral body to which contesting parties can submit their disputes. It would behoove all interested parties, in every instance, to have their claims brought before a single arbitral body created for the specific purpose of resolving cultural property disputes. This omission in the Convention carries the consequence of divergent results as parties to a cultural property dispute may seek out different arbitral bodies.¹⁰⁰ Although arbitration processes, in general, provide for similar procedures, relying on different national or international arbitral tribunals each time a cultural property dispute arises between Contracting States diminishes the chances for the consistent interpretation of the UNIDROIT Convention. If an agreement is not reached to provide for a special arbitral body for cultural property disputes, three things will surely happen: (1) uniformity in interpreting and applying the Convention will be lost; (2) parties to a cultural property dispute will most likely be subject to foreign arbitration rules thereby increasing the risk of providing an unfair advantage for the party in whose State the arbitration procedure is

⁹⁹ See UNIDROIT Convention of 1995, *supra* note 17, ch. IV, art. 8(2), 34 I.L.M. at 1334.

¹⁰⁰ See *infra* note 115 and accompanying text.

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being conducted; and (3) because different arbitral tribunals may interpret the provisions of the Convention differently, any semblance of uniformity will be eliminated, forcing parties to resort to national courts. Therefore, it is in the interest of all States that parties to the UNIDROIT Convention work together to create a special arbitral tribunal for the resolution of cultural property disputes. The task of creating a special arbitral tribunal can be made much easier by modeling the tribunal on existing arbitral rules and procedures of similar bodies.

A. Models Upon Which to Pattern an International Arbitration Tribunal for Cultural Property Disputes

Today, there are many models upon which an international arbitral tribunal for the resolution of cultural property disputes could be modeled. One such model is the Permanent Court of Arbitration (PCA).¹⁰¹ The PCA is the oldest institution for the settlement of disputes between States, organizations of States and States and private parties.¹⁰² An independent organization established in 1899, the PCA consists of a panel of international jurists who are designated by parties to the Convention for the Pacific Settlement of International Disputes.¹⁰³

An arbitral body designed to resolve cultural property disputes based on the PCA would be capable of offering a broad range of legal services for the resolution of cultural property disputes. When a cultural property dispute arises, the contesting parties would be permitted, but not required, to select the members of a tribunal or commission from a panel consisting of members specializing in cultural property disputes. Such an arbitral body would be able to administer dispute settlements which could include arbitration, conciliation, mediation and commissions of inquiry for fact-finding.¹⁰⁴ Moreover, an arbitral body designed to resolve cultural property disputes could look to the PCA's host of effective procedural rules. For instance, in the event of a deadlock that may arise in connection with the appointment and challenge of arbitrators, the PCA provides for an

¹⁰¹ See *Permanent Court of Arbitration, Permanent Court of Arbitration Home Page* (updated Dec. 20, 1996) <<http://www.law.cornell.edu/icj/pca/eng/HOME.htm>>.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*

“appointing authority” to resolve the deadlock.¹⁰⁵

The cultural property arbitral body could also base its procedures on those utilized in international commerce. Over the past several decades, arbitration, as opposed to litigation, has increasingly become the preferred method of resolving international commercial disputes between private parties in national courts.¹⁰⁶ Of particular importance are the rules and procedures established by the United Nations Commission on International Trade Law (UNCITRAL) in 1976 and the UNCITRAL Model Law on International Commercial Arbitration (Model Law).¹⁰⁷ The Model Law’s aim was to constitute a sound and promising basis for the desired harmonization and improvement of national laws.¹⁰⁸ It directs that “all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.”¹⁰⁹ The Model Law has a broad scope, covering “all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.”¹¹⁰

The Model Law sought to address two important issues which also exist in cultural property discussion: (1) the inadequacy of domestic laws; and (2) the disparity between national laws. Having conducted a global survey of national laws on arbitration, UNCITRAL discovered that considerable disparity existed regarding individual provisions and solutions as well as terms of development and refinement.¹¹¹ Some national laws were outdated while others were considered fragmentary in that they did not address

¹⁰⁵ See *Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State*, arts. 6, 7 and 8 (updated Dec. 20, 1996) <<http://www.law.cornell.edu/icj/pca/eng/OPT1.htm>> .

¹⁰⁶ See Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution’s Role*, DISP. RESOL. J., June, 1994, at 12.

¹⁰⁷ See *UNCITRAL Model Law on Int’l Commercial Arbitration*, 1985 U.N. Com’n on Int’l Trade (visited Oct. 9, 1997) <<http://www.un.or.at/uncitral/htm>> .

¹⁰⁸ See *id.*

¹⁰⁹ See *Commentary Prepared by the Secretariat of the Model Laws UNCITRAL Yearbook*, vol. XVI, 1985 (visited Oct. 9, 1997) <<http://www.un.or.at/uncitral/htm>> .

¹¹⁰ *Id.*

¹¹¹ See *UNCITRAL Model Law on Int’l Arbitration* (visited Oct. 9, 1997) <<http://www.un.or.at/uncitral/htm>> .

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relevant issues or were drafted with domestic arbitration in mind.¹¹² Moreover, “[u]nexpected and undesired restrictions found in national laws” in turn adversely affect a party’s ability to select the arbitrator freely or to have the proceedings conducted according to agreed rules of procedure.¹¹³ The fact that the UNIDROIT Convention’s general arbitration provision does not provide for a specific arbitral body to resolve disputes raises the same risks of imposing traditional, local concepts of arbitration on international cases. In such cases, the needs of modern international practice will not be met.

UNCITRAL recognized that disparity often exists between national laws which can prejudice the outcome of an arbitral proceeding.¹¹⁴ Without a systematized arbitral proceeding on which to rely, parties are confronted with foreign and unfamiliar provisions and procedures. The importance of the precedent set by the UNCITRAL Model Law cannot be overstated.¹¹⁵

UNCLOS III offers perhaps the most relevant model on which to pattern a special arbitral body to resolve cultural property disputes. The rules provided by UNCLOS III are highly relevant considering the national interests involved when asserting preferential rights in archeological or

¹¹² “Even most of those laws which appear to be up-to-date and comprehensive were drafted with domestic arbitration . . . in mind.” *Id.*

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.* Although it is just a model, “[a]s a response to the inadequacies and disparities of national laws, the Model Law presents a special regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law.” *Id.* Yet, UNCITRAL’s Model Law is just one example of rules and proceedings for arbitration that are available. Besides UNCITRAL, there are a host of other internationally recognized arbitral tribunals from which UNIDROIT could derive its own arbitration. The most notable institutions are the International Chamber of Commerce (ICC) and the International Center for the Settlement of Investment Disputes (ICSID). There are other notable national arbitral bodies that provide their services to international cases. Some of the world’s leading national arbitral institutions are the London Court of International Arbitration; the American Arbitration Association and the Arbitration Institute of the Stockholm Chamber of Commerce. *See generally* Daniel M. Kolkey, *Dispute Resolution and International Commercial Agreements*, 676 PRAC. L. INST. 527, 542 (1993). However, reliance on national arbitral bodies can often lead to unfair disadvantages for foreign parties. *See supra* note 90 and accompanying text. Of particular importance in terms of proposing a model arbitral body for cultural property disputes under UNIDROIT, is the International Chamber of Commerce.

historical objects found in the "Area."¹¹⁶ Although UNCLOS III calls for the resolution of disputes between States,¹¹⁷ the issues relating to the preferential rights of a coastal State with respect to a cultural object found in the Area are analogous to some of the same sovereignty issues in cultural property disputes.

Questions of property rights in archeological and historical objects are similar to disputes about cultural property. UNCLOS III states that archeological artifacts must be preserved for the "benefit of mankind as a whole."¹¹⁸ Yet, the drafters also gave preferential rights to the "State or country of origin, or the State of cultural origin, or the State of historical and archeological origin."¹¹⁹ Hence, the dichotomy that exists in all the international conventions regarding the protection of cultural property and that frames claims of ownership in cultural property disputes—cultural internationalism versus cultural nationalism—is echoed in UNCLOS III. "According to some commentators, the principle that archeological artifacts should be preserved for the 'benefit of mankind as a whole' implies that there is a commonness of ownership and benefit of [cultural objects] with archeological significance."¹²⁰ A quick glance at Article 149 reveals that the "benefit of mankind as a whole" is much like the UNIDROIT Convention of 1995's "cultural heritage of mankind."¹²¹

Under UNCLOS III, State parties are required to attempt to resolve their dispute first through settlement.¹²² Aside from the obligation to negotiate a settlement, States have the option of conciliation.¹²³ Only when both parties have reached an impasse can the claim be brought before the tribunal for resolution.¹²⁴ Similarly, when disputes arise between signatories to the UNIDROIT Convention of 1995, the Convention should require the contesting parties to attempt to reconcile their differences before submitting the issue for arbitration.

¹¹⁶ The Area is that body of water above the deep seabed adjacent to the territorial waters of the coastal state. *See* U.N. Doc. A/CONF.62/122.

¹¹⁷ *See id.* at art. 59.

¹¹⁸ UNCLOS III, *supra* note 96, art. 149, 21 I.L.M. at 1295.

¹¹⁹ *See* Strati, *supra* note 97, at 296.

¹²⁰ Anne M. Cottrell, *The Law of the Sea and International Marine Archeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 *FORDHAM INT'L L.J.* 667, 706 (1994).

¹²¹ *See* UNCLOS III, *supra* note 96, art. 149, 21 I.L.M. at 1295.

¹²² *See id.* at art. 283, 21 I.L.M. at 1322.

¹²³ *See id.* at art. 284, 21 I.L.M. at 1322.

¹²⁴ *See id.* at arts. 284(3) and 286, 21 I.L.M. at 1322.

B. A Detailed Proposal for an International Arbitration Tribunal for the Resolution of Cultural Property Disputes

An international arbitral tribunal for cultural property disputes would be the ideal mechanism for both enhancing the Convention's effectiveness and settling disputes that arise under the Convention. Such a tribunal can come into existence in one of two ways. First, the President of UNIDROIT or five Contracting States can convene a special committee in order to review the practical operation of the Convention and the need for an international arbitral tribunal.¹²⁵ Having assessed the need for such a tribunal, a conference of all the Contracting States can be called for the specific purpose of establishing an arbitral tribunal under the Convention. Second, Contracting States to the Convention can enter into their own agreements for the purpose of establishing such an arbitral body.¹²⁶ The arbitral tribunal itself is loosely modeled on the aforementioned arbitration bodies, particularly UNCLOS III, which provides the best model for the jurisdiction, composition and neutrality of this arbitral tribunal. Once this arbitral body is created, the chaos surrounding cultural property disputes can be resolved.

1. Jurisdiction

Under Article 8, paragraph 2 of the UNIDROIT Convention, the arbitration tribunal would have complete jurisdiction to hear international cultural property cases brought before it. The arbitration tribunal would have the authority to hear all cases regarding cultural property disputes. This would include cases that concern the restitution of stolen cultural objects (Chapter II),¹²⁷ the return of illegally exported cultural objects (Chapter III),¹²⁸ as well as those cultural property disputes that address acts that occurred before the Convention entered into force.¹²⁹ The arbitration tribunal should also have the authority to rule on: (1) interim measures in cases where there is a real threat of destruction to the cultural object; (2)

¹²⁵ See UNIDROIT Convention of 1995, *supra* note 17, ch. V, art. 20, 34 I.L.M. at 1338.

¹²⁶ See *id.* at ch. II, arts. 3 and 4, 34 I.L.M. at 1331, 1332.

¹²⁷ See *id.* at ch. III, arts. 5, 6, and 7, 34 I.L.M. at 1332-1334.

¹²⁸ See *id.* at ch. V, art. 13(2), 34 I.L.M. at 1336.

¹²⁹ See *id.* at art. 10, 34 I.L.M. at 1335.

any objections brought by the disputing parties; (3) the form and contents of awards; and (4) the appointment of experts.¹³⁰ In all cases, the arbitration tribunal's decisions will be binding on parties to the dispute.¹³¹ Decisions rendered by the arbitration tribunal shall be in written form providing a record for the reasons of its decisions.

2. Composition of the Tribunal

Each signatory to the Convention will have the opportunity to elect three individuals to sit as members of the International Arbitration for Cultural Property Disputes Panel. The list of panel members shall be deposited with the Secretary-General of UNIDROIT. The panel members should consist of international jurists and practitioners of the highest reputation for fairness, competence and integrity. These members should be experts in the field of public and private international law as it relates to cultural property. The arbitral tribunal for each cultural property dispute will consist of five members. Each party in a cultural property dispute will have the opportunity to select two members from the panel of arbitrators. The fifth arbitrator shall be appointed by the arbitrators selected by the parties in the dispute.

3. Neutrality

In the interest of fairness and the neutrality of the proceedings, each party to the dispute shall be permitted to select one member who may be of the same nationality. The other three arbitrators will be nationals of third States. Prior to the commencement of the proceedings, the disputing parties must have agreed to the language in which the arbitral proceedings will be conducted. The costs of the arbitration proceedings shall be borne by all parties to the cultural property dispute. Each member of the arbitration tribunal, in the exercise of his or her duties, shall enjoy complete diplomatic privileges and immunities.

¹³⁰ Such experts could include specialists in art or archeology.

¹³¹ This is reinforced by the idea that the New York Convention on the Recognition of Foreign Arbitral Awards makes foreign arbitration decisions binding. See *infra* note 132.

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4. *Recognition of Award*

The decision reached by the arbitration tribunal shall be binding on the parties to the dispute and will be enforced by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention).¹³² The New York Convention is one of the most recognized international conventions and is complied with by virtually all countries.¹³³ The New York Convention calls for the application of the Convention to:

the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.¹³⁴

Thus, as signatories to the UNIDROIT Convention as well as the New York Convention, parties to a cultural property dispute will have to accept decisions ordered by the International Arbitration Tribunal for the Resolution of Cultural Property Disputes.

V. CONCLUSION

It is time for the legal community to realize that an international arbitral tribunal for the resolution of cultural disputes is needed now if the UNIDROIT Convention of 1995 is to have a meaningful future. Cultural property disputes, by their very nature, are extremely contentious as both property rights and sovereignty issues are involved. The international legal community has come a long way in trying to stop the illicit trade in cultural property. However good this may be, the regulatory framework of the UNESCO and UNIDROIT Conventions does not go far enough. In order to

¹³² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 2, 330 U.N.T.S. 3.

¹³³ Although many countries have expressed reservations prior to becoming signatories to the Convention, the fact that the Convention has remained in existence for so many years indicates an overwhelming support characterized by compliance of the Contracting States.

¹³⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 132, at 1(1).

level the playing field, a governing body to which cultural property disputes can be submitted must be created. As things stand now, billions of dollars are being spent on art that was illegally obtained.

The proposed international arbitral tribunal for the resolution of cultural property disputes would be a welcome addition to the international scene. While the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995 attempt to stop the illicit trade in cultural property, they are not enough. The limited scope of the UNESCO Convention along with the conflict of law problems of the UNIDROIT Convention warrant the creation and adoption of an arbitral tribunal that can resolve these disputes. Once such a tribunal is established, the equitable results that the UNIDROIT Convention has promised will begin to be seen.